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No.____

IN THE

Supreme Court of the United States

October Term, 1980

JODY JAMES and BARBARA JAMES,
Petitioners,

-vs-

FORD MOTOR CREDIT COMPANY and
DEL NORTE MOTOR COMPANY,
Respondents.

(Caption continued on inside cover)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 21, 1980

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

LISA HERNANDEZ,

Petitioner,

-vs-

O'NEAL MOTORS, INC. and
GENERAL MOTORS ACCEPTANCE CORP.,

Respondents.

JACKSON BROWN and DELORES BROWN,

Petitioners,

-vs-

WAYNE LOVELADY'S FRONTIER FORD,
INC. and FORD MOTOR CREDIT COMPANY,

Respondents.

THERESA M. SHIELDS,

Petitioner,

-vs-

FORD MOTOR CREDIT COMPANY
and CAPITOL MOTOR COMPANY,

Respondents.

NONA JACKSON,

Petitioner,

-vs-

WAYNE LOVELADY'S FRONTIER FORD,
INC. and FORD MOTOR CREDIT COMPANY,

Respondents.

(Caption continued on following page)

NELLIE PINO,

Petitioner,

-vs-

FORD MOTOR CREDIT COMPANY
and MT. TAYLOR FORD, INC.,

Respondents.

DAVID JUANICO and LUCY JUANICO,

Petitioners,

-vs-

RICHARDSON FORD SALES, INC. and
FORD MOTOR CREDIT COMPANY,

Respondents.

RITA CATA,

Petitioner,

-vs-

CAPITOL MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,

Respondents.

MARIE JOHNSON,

Petitioner,

-vs-

FORD MOTOR CREDIT COMPANY
and MT. TAYLOR FORD, INC.

Respondents.

No. ____

IN THE

Supreme Court of the United States

October Term, 1980

JODY JAMES and BARBARA JAMES, et al.
Petitioners,

-vs-

FORD MOTOR CREDIT COMPANY and
DEL NORTE MOTOR COMPANY, et al.,
Respondents.

QUESTIONS PRESENTED

1. Must an assignment of returned or unearned premiums of physical damage insurance be disclosed as a security interest under the Truth-in-Lending Act and Regulation Z?

2. May the Court of Appeals order a complaint dismissed with prejudice when there remain alternative bases for liability which were raised in the pleadings but not resolved by the District Court on summary judgment and not considered by the Court of Appeals?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Jody James and Barbara James, Lisa Hernandez, Jackson and Delores Brown, Theresa M. Shields, Nona Jackson, Nellie Pino, David Juanico and Lucy Juanico, Rita Cata, and Marie Johnson ("Petitioners") pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this cause on June 24, 1980, and the opinion of the Court of Appeals for the Tenth Circuit entered in denying the Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc entered July 21, 1980. Those decisions squarely present two important issues, on one of which the Circuit Courts of Appeal are now split due to the decision below.

OPINIONS BELOW

The opinions of the Court of Appeals (A-1, A-13, A-15. A-19) are to be published, but have not yet been assigned numbers in the Federal Reporter. The opinion of the District Court in *Hernandez, et al.*, (A-25) is reported at 480 F.Supp. 491 (D.N.M. 1979). The District Court opinion in *James* (A-21) is not reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered June 24, 1980. The order denying the Plaintiffs' timely Petition for Rehearing and Suggestion for Rehearing In Banc was entered on July 21, 1980. This Petition was filed within 90 days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and 15 U.S.C. Section 1640(e).

STATUTES INVOLVED

The statute and regulations involved in this case are: Consumer Credit Protection Act, §128(a) (10), 15 U.S.C. §1638 (a) (10):

> Sales Not Under Open End Credit Plans.
>
> (a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> * * *
>
> (10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Regulation Z, 12 C.F.R. §226.2(gg) (1980):

> **"Security interest" and "security"** means any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

Regulation Z, 12 C.F.R. §226.8(b) (5) (1980):

> (b) **Disclosures in sale and nonsale credit.** In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * *
>
> (5) A description or identification of the type of any security interest held or to be retained or acquired by

the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

Regulation Z, 12 C.F.R. §226.8(a) (1980):

(a) **General Rule.** Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above

or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction.

Consumer Credit Protection Act, §130(g), 15 U.S.C. §1640(g):

(g) The multiple failure to disclose to any person any information required under this chapter or chapter 4 or 5 of this title to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries.

STATEMENT OF FACTS

The petitioners are twelve (12) persons who, either individually or as husband and wife, in nine (9) separate transactions in 1977 and 1978, purchased motor vehicles in New Mexico and Colorado for their own personal and family use. In all instances, the sellers financed the purchases and immediately after consummation, assigned the installment contracts to finance companies. The contracts provided for monthly payments ranging from $152.79 (*Cata*) to $320.73 (*Juanico*) for from 30 months to 48 months, with annual percentage rates ranging from 13.51% (*Shields*) to 15.4% (*James*).

Each contract is identical in all material parts.[1] On the front

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[1] Eight (8) of the transactions involved purchases from Ford Motor Company dealers, who in each case used identical installment contract forms prepared by Ford Motor Credit Company, which subsequently accepted the assignment of the contracts. The ninth transaction (Hernandez) was an identical arrangement involving General Motors Acceptance Corporation and a General Motors dealer. Although the actual language of the GM →

side of the contract appears the following description of the security interest taken:

> Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) [the motor vehicle] and in the proceeds thereof to secure payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

No other mention of any security interest is made elsewhere on the front side of the contract. The reverse side of the contract contains the following provision:

> 18. RISK OF LOSS – INSURANCE
> The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage, or destruction of or to the Property in such forms and amounts as Seller may require. . . . *Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums,* and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. *The proceeds from such insurance, by whomever obtained, shall be applied*

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1 (Cont. from pg. 4)

contract is of course different from that in the Ford contract, it contains similar relevant provisions, which the Court of Appeals concluded have the same import and effect as the corresponding Ford language. (A-17). On this point there has been no disagreement as the District Court had reached the same conclusion. (A-38). For the sake of consistency and in light of these holdings, reference throughout this Petition is made only to the Ford provisions.

toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller. (Emphasis added.)

Because of the consumer nature of these credit transactions, the disclosure requirements of the Truth-in-Lending Act ("the Act") and Regulation Z apply. 15 U.S.C. §1631 (a). The significance of the fact that the provision creating the assignment of unearned or returned insurance premiums appears on the reverse side of the contract is that, if that assignment does create a security interest as defined by Regulation Z, disclosure of its effect must accompany the other required disclosures on the front side of the contract. Regulation Z, 12 C.F.R. §226.8(a) (1980).[2]

Barbara and Jody James filed their complaint on June 29, 1978, in District Court for the District of Colorado seeking statutory damages pursuant to the Act for their creditors' failure to properly disclose the security interest in the returned or unearned insurance premiums. On the creditors' motion to dismiss under Rule 12(b) (6), F.R.Civ.P., the District Court, without providing opportunity for responsive pleading or hearing, entered its Memorandum Order Dismissing Complaint on August 21, 1978. The District Court concluded that the assignment was not a security interest as defined by Article 9 of the Uniform Commercial Code, and applying that definition to the Act, dismissed the Complaint. (A-22). The Court of Appeals although affirming that dismissal, rejected the District Court's reasoning and rejected the limitation imposed by state law definitions upon federal law.

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[2] This section of Regulation Z gives creditors the option of making all of their disclosures on one side of the credit contract or on one side of a separate disclosure statement. The creditors in these cases all chose the former option of a combined contract-disclosure statement.

The remaining eight (8) cases were all filed during 1978 and 1979 in the District Court for the District of New Mexico. Each complaint alleged various violations of the Act and Regulation Z, including the security interest violation presented here, and were subsequently consolidated by orders entered on September 13 and September 25, 1979. On October 16, 1979, on motion for summary judgment, the District Court entered its Memorandum Opinion (A-28) granting partial summary judgment, holding that as a matter of law the assignment of unearned or returned premiums created a security interest that must be disclosed pursuant to the Act, 15 U.S.C. §1638(a) (10), and Regulation Z, 12 C.F.R. §226.8(b) (5) (1980). The District Court also concluded, however, that the facts were in dispute as to whether the transactions were in fact consumer transactions and set that remaining issue for trial. (A-37). Following trial, the District Court ruled that each of the transactions was a consumer transaction, and therefore entered judgment for plaintiffs in each case for statutory damages pursuant to 15 U.S.C. §1640(a) of $1,000.00 plus reasonable attorney's fees. (A-38).

On June 24, 1980, the Court of Appeals for the Tenth Circuit issued its opinion in the *James* case. (A-1). At the same time, it decided the New Mexico cases, which remained consolidated on appeal under the *Hernandez* caption, by referencing its *James* decision. (A-17). The Court of Appeals affirmed *James* and reversed *Hernandez*, concluding that the assignment of the insurance premiums need not be disclosed as a security interest, in spite of a dissenting opinion by one member of the panel.

In the *Hernandez* cases, the Court of Appeals directed the District Court to dismiss the complaints, although the remaining theories of liabilities had not been resolved on summary judgment. On July 21, 1980, the Court of Appeals denied in both *James* and *Hernandez* the Petitions for Rehearing and

Suggestion for Rehearing In Banc (A-13, A-20), supplementing the initial decision with a short explanation of its reliance on the legislative history of the Truth-in-Lending Simplification Act. No explanation was given in the *Hernandez* cases as to why the plaintiffs there were to be barred from litigating the remaining issues.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals creates an irreconcilable conflict with opinions in the Third, Fifth, Seventh and Eighth Circuits resolving the identical issue.[3] In each of these Circuits, the same assignment clause must be disclosed as a security interest, while in the Tenth Circuit, the opposite result attains.

A large number of courts, both federal and state, have reviewed this issue and the opinion below stands alone as the sole authority* in the country now to hold that the assignment is not a security interest.[4] Furthermore, since state courts in interpreting federal law do not consider themselves necessarily

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[3] Contrary to the opinion below, the Third Circuit in *Gennuso v. Commercial Bank and Trust Co.*, 566 F.2d 437 (3rd Cir. 1977), the Fifth Circuit in *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied* 441 U.S. 951 (1979), the Seventh Circuit in *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278 (7th Cir. 1980), *petition for cert. filed* 49 U.S.L.W. 3031 (U.S. July 19, 1980), and the Eighth Circuit in *Murphy v. Ford Motor Credit Company*, Nos. 79-1822 and 79-2061 (8th Cir. filed August 28, 1980), *petition for rehearing denied* (8th Cir. 9-23-80), have each held that an assignment of unearned or returned insurance premiums constitutes a security interest which must be disclosed pursuant to the Act and Regulation Z. The decisions in *Edmondson, Murphy* and *Valencia* in fact so held in regard to the same Ford Motor Credit Company contract form as is presented below.

* See page 9, opposite.

[4] See page 9, opposite.

bound by the decisions of the United States Court of Appeals for its state[5] and since the Act provides for concurrent jurisdiction in both the federal and state courts, 15 U.S.C. §1640(e), it is possible that contrary decisions on this identical question may result depending on whether a plaintiff chooses a state or federal forum. This latter contingency is particularly likely to occur because of the dearth of authority, in logic, statute, or case law, to support the opinion below. This conflict and potential for further conflict is unconscionable in the area of a federal statute such as the Truth-in-Lending Act which provides comprehensive standards for a nationwide consumer credit industry.

In addition, the opinion below disregards the teaching of this Court only last term in *Ford Motor Credit Company v. Milhollin*, ____U.S.____, 100 S.Ct. 790 (1980). In *Milhollin*,

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(Cont. from page 8)

* It has only recently come to the attention of Petitioners that the United States District Court for the District of South Carolina in *Ancrum v. Charleston Lincoln-Mercury, Inc. and Ford Motor Credit Company*, No. 78-804, decided August 19, 1980, followed the decision of the Tenth Circuit in *James*. The *Ancrum* court made its ruling prior to the Eighth Circuit's decision in *Murphy*, and a notice of appeal to the Fourth Circuit was filed on Sept. 15, 1980. The *Ancrum* opinion illustrates the disruptiveness following in the wake of *James*, and the quandary in which District Courts now find themselves.

4 See for example *Kinser v. Ford Motor Credit Company*, Nos. 79-1408, 1409 (E.D. Tenn. 1980); *Hagler v. Ford Motor Credit Company*, 5 CCH Consumer Credit Guide Par. 97,508 (Ala. Civ. App. 1980).

5 *Rahn v. Warden*, 498 P.2d 1344 (Nev. 1972); *People v. Turner*, 342 N.E.2d 158 (Ill. App. 1976); *State v. Lafferty*, 309 A.2d 647 (Me. 1973); *Security Mills of Ashville, Inc. v. Wachovia Bank and Trust Co.*, 189 S.E.2d 266 (N.C. 1972); *Anderson v. Savannah Machine and Foundry Co.*, 100 S.E.2d 621 (Ga. App. 1957). See also *Roberts v. Allied Finance Co.*, 198 S.E.2d 416 (Ga. App. 1973) (state court not bound by federal district court decision in Truth-in-Lending case).

this Court condemned the tendency on the part of federal judges to substitute their judgments as to what information ought or ought not to be disclosed for the authoritative conclusion of the Federal Reserve Board as to what disclosures are required to be made under the Act. Yet the opinion below never analyzes the definition of "security interest" contained in Regulation Z; instead, it undertakes itself to balance the various competing considerations to reach "an equitable result" (A-8) that this particular disclosure need not be made.

If this Court declines to exercise its jurisdiction to resolve this conflict among the Circuits, it is still appropriate to grant this Writ to allow the District Court to consider the alternative bases for liability presented in seven (7) of the cases. Under the terms of the Act, 15 U.S.C. §1640(g), a consumer is entitled to only a single statutory recovery whether there is a single violation or are multiple violations of the Act. By granting partial summary judgment, it became unnecessary for the District Court to review the alternative bases of liability. The Court of Appeals, by reversing that judgment and ordering the complaints dismissed with prejudice, has prevented any consideration whatsoever to be given to the alternative theories of liability and has denied these Petitioners any opportunity to be heard by any court on their alternative claims.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS IN THE THIRD, FIFTH, SEVENTH AND EIGHTH CIRCUITS.

The Tenth Circuit is the fifth Circuit Court of Appeals to address and answer this identical question regarding the Truth-in-Lending Act and Regulation Z. Unlike the other four, however, the decision below holds that the assignment provision creates no security interest. In spite of its recognition of the existence of this unanimous authority within the federal judiciary sustaining Petitioners' position, the Court below rejected

that authority, candidly admitting that it would "not delve into" the analyses undertaken by the Third, Fifth, and Seventh Circuits.[6] (A-8). At no point does the opinion below consider the reasoning of the remainder of the federal judiciary, let alone reject that reasoning.

A. THE FIFTH CIRCUIT DECISION IN *EDMONDSON v. ALLEN-RUSSELL FORD, INC.*

In *Edmondson v. Allen-Russell Ford, Inc., supra,* the Fifth Circuit reviewed not only this precise issue, but did so in regards to the same form contract provision as presented here. The starting point for the analysis in *Edmondson* is, as it must be in an area of statutory construction, the definition of the term under scrutiny:

> "Security interest" and "security" means any interest in property which secures payment or performance of an obligation.

Regulation Z, 12 C.F.R. §226.2(gg) (1980). With reference to its earlier interpretation of the same statutory term in *Elzea v. National Bank of Georgia,*[7] the Fifth Circuit examined the nature and elements of this functional definition:

> We stressed in *Elzea* that technical characterizations "are not determinative of whether a creditor holds a security interest under Regulation Z's definition." *Id.* at 1249-50. Rather, "[t]his question should be answered by examining the rights which the creditor has." *Id.* at 1250. We noted as significant factors whether the

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6 The Eighth Circuit rendered its decision two (2) months after the Tenth Circuit issued its opinion. Of course, the Tenth Circuit did not have the benefit of the Eighth Circuit's analysis, which specifically rejects the position of the Tenth Circuit.

7 570 F.2d 1248 (5th Cir. 1978).

> creditor has an interest in property and whether "the assignment helps to secure payment of the obligation." *Id.* Even property which "cannot presently be identified and may not yet exist" may be the subject of a security interest for Regulation Z purposes. "What is important is that the . . . privilege is valuable to the debtor and he has given up this valuable privilege to the extent of his debt." *Id.*

577 F.2d at 294.

Since the creditor in *Edmondson* has been assigned the right to use the returned or unearned insurance premiums to satisfy the debt or to satisfy the debtor's duty to keep the collateral insured (thus "secur[ing] payment or performance of an obligation"), and since the assignment is of a right to receive the refund of money (thus an "interest in property"), the assignment constitutes a security interest as defined by Regulation Z. This conclusion is inescapable in light of the functional definition:

> We think it clear beyond peradventure that the assignment of returned or unearned premiums of physical damage insurance confers on the creditor an interest in property which helps to secure payment or performance of contractual obligations. The creditor is expressly granted "sole discretion" to apply returned premiums toward payment of the indebtedness; this discretion may, of course, be exercised in the event of default. The creditor may also apply the returned premiums toward substitute insurance on the property, thereby securing the debtor's contractual obligation to obtain and maintain insurance on the vehicle. See note 5, *supra.* The assignment thus meets the established definition of a security interest and must be disclosed.

Id.

Once having reached that conclusion, the Fifth Circuit added its observation that its decision was consistent with both the

Third Circuit decision in *Gennuso v. Commercial Bank and Trust Co., supra,* and the position of the Federal Reserve Board staff,[8] and otherwise was supported by "principle [and] precedent." *Id.* at 295.[9]

B. THE SEVENTH CIRCUIT DECISION IN *VALENCIA v. ANDERSON BROS. FORD, INC.*

Valencia v. Anderson Bros. Ford, Inc., supra, also involves the identical Ford Motor Credit Company form assignment provision. The thrust of the argument of the creditors in *Valencia* was that state law determines whether a right or interest is a security interest. The Seventh Circuit rejected that argument, agreeing with the Fifth Circuit that the proper analysis "focuses on the nature of the substantive rights conferred on a creditor rather than on state law characterizations of those rights." 617 F.2d at 1285:

> This approach to the definition of "security interest" is reasonable, straightforward in application and furthers the federal interest in uniform disclosure of terms and conditions of consumer credit transactions.

Id.

On this one point, the decision below is consistent with the other Circuits. As noted above, the District Court in *James* had embraced this aspect of the creditors' argument, a limitation

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8 Public Position Letter No. 377 (July 22, 1970) is reproduced in full in the margin of *Edmondson,* 577 F.2d at 295, n. 8, at [1969-1974 Special Releases Transfer Binder] CCH Consumer Credit Guide Par. 30,555 (July 22, 1970), in the Appendix hereto, and is discussed in detail at Section II, *infra.*

9 The Fifth Circuit reached the same result in *Shanks v. Greenbriar Dodge, Inc.,* 577 F.2d 296 (5th Cir. 1978), decided the same day as *Edmondson.*

which the Tenth Circuit specifically rejected. (A-4).[10]

Having rejected this state law limitation, the *Valencia* court performed the simple statutory analysis of applying the Regulation Z definition:

> The assigned premiums may be used, in the sole discretion of the creditor, to purchase replacement insurance coverage or to pay part of the debtor's indebtedness. . . . The creditor has the authority to cancel the insurance and cause payment of unearned premiums to itself at any time. The contract clearly gives the creditor an interest in property which secures performance of a debtor's obligations.

617 F.2d at 1286.

C. THE EIGHTH CIRCUIT DECISION IN *MURPHY v. FORD MOTOR CREDIT COMPANY*

On August 28, 1980, the Eighth Circuit decided *Murphy v. Ford Motor Credit Company, supra.* The Eighth Circuit had an advantage not available to the other Courts of Appeals: it was able to reach its conclusion with full knowledge of the conflict among the Circuits and of the reasoning employed by the Tenth Circuit in creating that conflict. The Eighth Circuit rejected the decision below and chose instead to align itself with the Third, Fifth, and Seventh Circuits.

The Eighth Circuit concluded that Regulation Z itself provides the authority to reach a decision:

> [T]he arguments of the appellants must fail under the clear definition of security interests. . . . The application

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[10] The Seventh Circuit placed reliance on the District Court opinion in the *Hernandez* cases, deciding that state law is relevant in this analysis for the purpose of determining whether the right conferred on a creditor is an "interest in property" under the federal definition: "A creditor's substantive rights are still governed by state law; federal law merely classifies those rights for disclosure purposes." 617 F.2d at 1285.

> of the proceeds of the insurance, whether in the form of an indemnity or returned or unearned premiums, places the assignment squarely within the definition of a security interest under Regulation Z. Undeniably, the premiums would go to secure "payment or performance of an obligation," i.e., the payment of the principal and interest of the amount of the loan to the debtor.

Murphy v. Ford Motor Credit Company, supra, Slip op., pp. 6-7.

In regard to the decision below, the Eighth Circuit reviewed the language from the Senate Report of the new Truth-in-Lending Simplification and Reform Act, *infra,* the same legislative history on which the Tenth Circuit relied in creating the conflict which now exists. The Eighth Circuit found that the new law, and by necessity its legislative history, could not apply to transactions pre-dating its enactment:

> However, this new Act does not take effect for two years from the date of its enactment (§625 of the Act), and the present action arises out of and is controlled by, the existing Act.

Slip op., p. 9. Therefore, the Eighth Circuit followed the Federal Reserve Board and Regulation Z, found the identical assignment clause as presented here to create a security interest, and left the decision below as the one inconsistency among the five Circuits on this question of federal law.

D. THE THIRD CIRCUIT DECISION IN *GENNUSO v. COMMERCIAL BANK AND TRUST CO.*

The Third Circuit in *Gennuso v. Commercial Bank and Trust Co., supra,* reviewed an assignment of insurance proceeds clause which is not identical to the standard contract apparently used nationwide by Ford Motor Credit Company. Nevertheless, the import of the language creates the identical interest to the benefit of the secured party: it requires physical damage insur-

ance to cover the secured party's interest in the vehicle, assigns the returned or unearned premiums due upon cancellation to the secured party, and allows the secured party to apply those premiums to the balance of the debt. The Third Circuit concluded that the assignment provision creates a security interest which must be disclosed pursuant to Regulation Z. *Id.* at 440, n. 2.[11]

II. THE DECISION BELOW DISREGARDS REGULATION Z AND THE VIEW OF THE STAFF OF THE FEDERAL RESERVE BOARD

Last term in *Ford Motor Credit Co. v. Milhollin, supra,* this Court directed the judiciary, in interpreting the Truth-in-Lending Act, to guide itself by the existing* pronouncements of the Federal Reserve Board ("FRB") and to refrain from substituting its own judgments as to what information ought or ought not to be disclosed for the views of the FRB. The warning in *Milhollin* disregarded by the Court below is explicit:

> [J]udges are not accredited to supercede Congress or the appropriate agency by embellishing upon the regulatory scheme.

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[11] The full text of the contract clause is reproduced in the District Court opinion, *Gennuso v. Commercial Bank and Trust Company,* 425 F.Supp. 461, 466, n. 10 (W.D.Pa. 1976).

* The Federal Reserve Board very recently issued a proposed Official Interpretation, No. FC-0173, which was published on page 63,295 of the September 24, 1980 Federal Register. This proposed Interpretation is not yet in effect, and was certainly not in effect at the time the contracts in question were entered into by Petitioners and Respondents nor at the time of any of the Circuit Court opinions. The state of the law at the time of execution of the contracts was as it existed in Public Position Letter No. 377 and the Circuit Court opinions. Thus, the proposed Interpretation – whether or not it becomes final – is irrelevant for purposes of this case.

100 S.Ct. at 797. This Court then repeated this, the clearest message contained in the *Milhollin* decision:

> [J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational. . .[A] court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views.

100 S.Ct. at 798.

The Act and Regulation Z both require in identical language the disclosure of "a clear identification of the property to which the security interest relates." 15 U.S.C. §1638(a) (10) and Regulation Z, 12 C.F.R. §226.8(b) (5). Regulation Z provides the definition of "security interest" which by the very terms of §226.2 of Regulation Z applies to the use of the term throughout the Act. The opinion below never undertakes the straightforward statutory analysis of determining whether the assignment provision of the insurance premiums, to be applied to the balance of the debt or to the purchase of substitute insurance, "secures payment or performance" of the debtor's obligations, the operative language from the Regulation Z definition; and if so, whether that "security interest" is disclosed as required. Because the opinion below fails to give effect to Regulation Z itself, it does not merely ignore the teaching of this Court in *Milhollin*, which requires deference to the FRB staff,[12] but it circumvents the dictates of the seminal case on this subject, *Mourning v. Family Publications Service*, 411 U.S. 356 (1973), which recognizes that Regulation Z carries the force of law.

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[12] The one major difference between *Milhollin* and this case is that there is no interstice whatsoever in the law regarding security interests as there was in *Milhollin* regarding acceleration clauses.

Even in the absence of *Mourning* and *Milhollin*, both of which command strict adherence to the provisions of Regulation Z specifically, the failure of the Court below to analyze a statutory definition contained in the implementing regulation in interpreting the meaning of the defined term itself is erroneous by virtue of the more general rules of statutory construction enunciated by this Court.[13] Without performing this analysis, the Court below concluded that "the Act does not require" the disclosure of the assignment as a security interest. (A-7).

In an analogous unearned insurance premium situation, the staff of the FRB has expressed its opinion in 1970 that where, upon a debtor's default, the creditor "would have the right to cancel the policy and apply any premium refund to the unpaid balance" of the indebtedness, that right should be disclosed as a security interest. Public Position Letter No. 377 (A-48). The only distinction between the situation posited in Letter No. 377 and that presented here is that the former relates to life insurance while the latter relates to physical damage insurance. Without explaining what difference flows from that distinction, the Court below simply stated that it was "aware of no administrative interpretations pertinent to the particular issue before [it]" (A-7) and dismissed any guidance that it might have received from the letter.

Although Letter No. 377 is not an official interpretation such as was considered in *Milhollin*, the reasoning of this Court in that case is equally applicable in regard to unofficial interpretations. The expertise of the administrative agency's staff and the need to foster uniform guidance apply whether the existing interpretation is official or unofficial. Even prior to *Milhollin*, the lower courts had been convinced that these exist-

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13 See *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

ing unofficial opinions were entitled to great weight.[14] *Milhollin* has only reinforced that natural tendency. Still, the opinion below refused to give any consideration to Letter No. 377 and the conclusion reached below now conflicts with that interpretation of the FRB staff.

III. RELIANCE ON RECENT CONGRESSIONAL AMENDMENTS WAS ERRONEOUS

On March 31, 1980, the President signed the Truth-in-Lending Simplification and Reform Act, P.L. 96-221, Title VI, 94 Stat. 132, 168 ("TIL Simplification"). Dictum in the Senate Report accompanying the bill states that in credit loans (not in credit sales such as here) the right to receive unearned insurance premiums need not be disclosed as a security interest. S.Rep. No. 96-368, 96th Cong., 1st Sess. (1979), *reprinted in* [1980] U.S. Code Cong. & Adm. News 834, 864 (May 1980 Supp.). By relying on this language from the legislative history of TIL Simplification, which itself only becomes effective on April 1, 1982,[15] and applying that to these transactions which occurred in 1977 and 1978, the opinion below concluded that Congress did not intend this disclosure to be required. (A-6).

The opinion denying Appellants' Petition for Rehearing (A-13) explained this reliance as being based on the doctrine of *in pari materia.* (A-14). However, an amendment to an earlier law can never be viewed as a clarification or interpretation of the earlier law if the legislative history of

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[14] See e.g. *Johnson v. McCracken-Sturman Ford,* 527 F.2d 257, 267, n.23 (3rd Cir. 1975); *Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971, 977 (5th Cir. 1974); *Bissette v. Colonel Mortgage Corp.,* 477 F.2d 1245, 1247 (D.C.Cir. 1973).

[15] §625 of TIL Simplification, 94 Stat. 185.

the amending statute indicates that, in enacting the amending statute, "Congress thought that it was changing the law by changing the language of the [law]". *United States v. Plesha*, 352 U.S. 202, 208 (1957).

TIL Simplification does in fact change the language of that part of the law requiring disclosure of the security interest.[16] Furthermore, the legislative history makes it abundantly clear that Congress understood that it was amending the law, not clarifying it. Its express intent in enacting this particular section was "to simplify the disclosures given to consumers." S.Rep. No. 96-368, [1980] U.S. Code Cong. & Adm. News, at p. 864. This is consistent with its overall intent to, *inter alia*, "provide the consumer with clearer credit information [and] made creditor compliance easier." *Id.* at 849. "[S]implification and reform of the Act" are the stated goals, *id.*, at 850, not interpretation or clarification of the earlier enactment which governs the transactions *sub judice*.

Contrary to *Murphy*, *supra*, the opinion below placed its sole reliance in breaking with the unanimous opinions of the Federal judiciary on a rule of statutory construction which, by its very terms, is inapplicable to the Act and TIL Simplification. It was on this basis that the Court below felt itself relieved of its obligation to review the considered views of three different Circuit Courts of Appeal on the identical issue of federal law and instead dismissed them with the observation that it "need not delve into the legal complexities of" their decisions. (A-8).

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16 Compare 15 U.S.C. §1638(a) (10), printed in full *supra*, with TIL Simplification §614(a) (9), 94 Stat. 179, which provides as follows:

> [T]he creditor shall disclose each of the following items, to the extent applicable: . . .
>
> (9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction or (B) property not purchased as part of the credit transaction identified by item or type.

IV. THE MANDATE OF THE COURT BELOW TO DISMISS THE COMPLAINTS WITH PREJUDICE DENIES PETITIONERS AN OPPORTUNITY TO BE HEARD ON THEIR ALTERNATIVE BASES OF LIABILITY

Seven (7) of the complaints alleged alternative bases of liability in addition to the inadequate security interest disclosure discussed above.[17] The District Court, in granting partial summary judgment for Petitioners, did not pass upon these other claims. This procedure is proper, as the Act, 15 U.S.C. §1640(g), provides that a consumer is entitled to only a single statutory recovery whether there is a single violation or multiple violations of the Act. To have reached the alternative claims, once having found one violation, would have served no purpose.

The Court of Appeals reversed the District Court's conclusion of law as to the single claim decided and also did not treat the various alternative bases of liability. However, the Court of Appeals directed the District Court to dismiss the complaints with prejudice. Petitioners alerted the Court of Appeals in their Petition for Rehearing and Suggestion for Rehearing In Banc that this mandate would deny them an opportunity to be heard on the alternative claims but that Petition was denied summarily. (A-20).

This Court has consistently remanded cases for further proceedings and determinations where issues, including alternative bases of liability, remain to be decided after rulings of trial or appellate courts have been made on fewer than all of the issues

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[17] In fact, all nine (9) complaints alleged alternative theories of liability. However, the plaintiffs in two of the cases (*Hernandez* and *James*) abandoned the alternative claims prior to appeal to the Court of Appeals, and now do not join this portion of the Petition. Reprinted in the Appendix hereto (A-49) is the paragraph from the complaint in *Shields* alleging liability of the creditors, and is included to exemplify the alternative bases of liability pleaded in the remaining seven (7) complaints.

raised by the parties.[18] No other rule would comport with due process of law. To deny Petitioners the right to have resolved an alternative basis of statutory liability is to deny them the opportunity to be heard guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution. *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Atkins v. United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1977).

CONCLUSION

Of the fifteen (15) Judges of the United States Courts of Appeals to have reviewed the question of whether the assignment of returned or unearned insurance premiums must be disclosed under the Act as a security interest, thirteen (13) have concluded that it must be so disclosed. Only two (2) of these Judges have rejected that view. Yet those two Judges comprised a majority of the panel in the Court below and have created a conflict among the Circuits in an area of federal regulation of a national industry where uniformity of Circuit opinion uniquely is required.

For all of the reasons stated above, Petitioners urge this Court to grant a Writ of Certiorari to review the decision below.

Respectfully submitted,

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October 21, 1980

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[18] See *United States v. Paramount Pictures,* 334 U.S. 131 (1948); *Peoria Indians v. United States,* 390 U.S. 468 (1968); *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Wyman v. Rothstein,* 398 U.S. 275 (1970); *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); *Dandridge v. Williams,* 397 U.S. 471 (1970); *Rosenblatt v. Baer,* 383 U.S. 75 (1966); *Hatahley v. United States,* 351 U.S. 173 (1956); and *Swanson v. Traer,* 354 U.S. 114 (1957).

OPINION BELOW IN THE COURT OF APPEALS
(June 24, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JODY JAMES and BARBARA JAMES, Plaintiffs-Appellants,	)	
v.	)	No. 78-1806
FORD MOTOR CREDIT COMPANY and DEL NORTE MOTOR COMPANY, Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. Civ. 78-F-647)

Richard J. Rubin (with him on the briefs were Paul L. Biderman and Timothy Meehan, attorneys for Northern New Mexico Legal Services, Inc. and Le Roy Cordova) for appellants.

Lawrence W. Treece (with him on the briefs were Holme, Roberts and Owen, Richard L. Schrepferman and Jeffrey A. Chase) for appellees.

Before SETH, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This action, which arose in Colorado, seeks recovery of a statutory civil liability for failure to disclose in an automobile

installment purchase contract the right of the seller to a returned and unearned insurance premium on a policy covering physical damage insurance. The claim is made under the Truth in Lending Act, TILA, 15 U.S.C. § 1601 et seq. as implemented by Federal Reserve Board Regulation Z, 12 C.F.R. § 226. The district court granted a motion to dismiss and the plaintiffs-buyers appeal. We affirm.

The plaintiffs-appellants, Jody and Barbara James, purchased a pick-up truck from defendant-appellee Del Norte Motor Company and executed an installment purchase contract which was assigned to Ford Motor Credit Corporation. The contract shows a cash price of $5,395.00, down payments of cash and trade-in totalling $900.50, and a balance due of $4,494.50. To this are added other charges consisting of $359.84 for insurance and $5.50 registration fee. Also added is a finance charge of $1,238.92, at an annual interest rate of 15.40%. The balance due is payable in monthly installments of $169.41.

Paragraph 13 of the signed face page of the contract reads:

> "Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and to the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due thereunder."

Paragraph 15 on the face page provides that the terms and conditions on the reverse side are incorporated by reference. Paragraph 18 on the reverse side relates to insurance and among other things provides:

> "Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive

> or collect same, * * *. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of the Seller."

TILA requires, 15 U.S.C. § 1631(a), that a creditor "clearly and conspicuously, in accordance with the regulations of the Board" disclose the information mandated by the Act. Reg. Z, 12 C.F.R. § 226.8(a) provides that all the disclosures be made on either:

> "(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature;
> or
>
> (2) One side of a separate statement which idenifies [sic] the transaction."

Failure to disclose properly the required information subjects the offender to a civil liability of not more than $1,000.00 plus reasonable attorneys' fees. 15 U.S.C. § 1640(a). The purchaser sue for the statutory liability and attorneys' fees. The trial court held that the assignment of the returned and unearned portion of the insurance premium was not a security interest under the Colorado version of the Uniform Commercial Code. See Colo. Rev. Stat. (1973) § 4-9-102.

TILA requires, 15 U.S.C. § 1638(a)(10), the disclosure of "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." The Act does not define "security" or "security interest." Reg. Z provides, 12 C.F.R. § 226.2(gg):

> " 'Security interest' and 'security' mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust and [various liens and a lease interest securing performance of an obligation]."

The reference to the Uniform Commercial Code specifically declares that it is not a limitation. Although the interplay of federal and state law presents problems, the right to the TILA civil liability for nondisclosure rests on federal law. TILA is remedial legislation, designed to prevent predatory creditor practices, and must be liberally construed to effectuate the intent of Congress. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365, and *Littlefield v. Walt Flanagan and Company*, 10 Cir., 498 F.2d 1133, 1136.

Three circuits have held that nondisclosure of the seller's right to unearned and returned premiums violates TILA and subjects the seller to the statutory liability. See *Gennuso v. Commercial Bank & Trust Company*, 3 Cir., 566 F.2d 437; *Edmondson v. Allen-Russell Ford, Inc.*, 5 Cir., 577 F.2d 291, *cert. denied* 441 U.S. 951; and *Valencia v. Anderson Brothers Ford*, 7 Cir., ____F.2d____. The last of these, *Valencia*, was decided on March 20, 1980.

On March 31, 1980, the President approved the "Truth in Lending Simplification and Reform Act" as Title VI of the "Monetary Control Act of 1980." P.L. 96-221, 94 Stat. 132. Section 614(a) amends 15 U.S.C. § 1638(a), the disclosure section of TILA. Subsection (a)(9) reads, U.S. Cong. & Adm. News, No. 3, May 1980, 94 Stat. 179:

> "Where the credit is secured, [the creditor shall disclose to the extent applicable] a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type."

S.R. 96-368, U.S. Cong. & Adm. News, *supra*, p. 850, states the purpose of the 1980 amendments thus:

> "Despite the act's clear successes, however, there is a growing belief among consumers and creditors alike that the act could be substantially improved. There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation. In addition, this committee and other congressional and government sources have found the level of administrative inforcement by the Federal bank agencies seriously inadequate. In short, the committee believes that the interests of both consumers and creditors would be furthered by simplification and reform of the act."

With particular reference to the amendment of the disclosure requirements of § 1638(a), the Senate Report says, Id. p. 864:

> "The security interest disclosure is also simplified to eliminate the technical disclosure of the type of security interest taken. When a security interest is being taken in property purchased as part of the credit transaction,

> this section requires a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, *the Committee intends this provision to require a listing by item or type of the property securing the transaction, but not a listing of related or incidental interests in the property.* For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under, or waived in accord with state law, accessions, accessories or proceeds."
> (Emphasis supplied)

S. Rep. No. 96-73 says, Id. at 879-880:

> "The subcommittee learned that judging from consumer tests in other areas, the typical disclosure statement utilized today by creditors is not an effective communication device. Most disclosure statements are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contactual [sic] terms.
>
> The result is a piece of paper which appears to be 'just another legal document' instead of the simple, concise disclosure form Congress intended."

Ford Motor Credit Co. v. Milhollin, ____U.S.____, 48 L.W. 4145, decided February 20, 1980, was concerned with the imposition of the statutory liability under TILA for a claimed nondisclosure of an acceleration clause. The Court concluded, 48 L.W. at 4146, that the issue of acceleration disclosure "is not

governed by clear expression in the statute or regulation, and * * * it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth in lending enactments." The Court examined the Federal Reserve Board staff treatment of acceleration disclosure and denied imposition of the statutory liability.

We are aware of no administrative interpretations pertinent to the particular issue before us. Public Position Letter No. 337, quoted in *Edmondson*, 577 F.2d 295, n. 8, relates to life insurance, not physical damage insurance. Staff Letter 1263, Consumer Credit Guide (CCH) Par. 31, 736 (November 23, 1977), an unofficial interpretation, leaves to state law the question of whether a security interest has been acquired by the creditor and, if so, whether that interest has been adequately identified.

In *Milhollin, supra*, 48 L.W. at 4149, the Court said:

> "The concept of 'meaningful disclosure' that animates TILA (citation omitted), cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather it describes a balance between 'competing considerations of complete disclosure. . . and the need to avoid. . . 'informational overload' (citations omitted) and striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices." (Emphasis in original).

The *Milhollin* approach parallels the intent of Congress in enacting the 1980 amendments and the legislative history of those amendments. The effort is to strengthen the impact of TILA by simple, concise disclosures which can be understood by consumers and creditors. The installment contract in issue identifies the security interest taken in the property purchased, the pick-up truck. The insurance charge is specifically noted on

the face of the contract and is included in the total amount which must be repaid in monthly installments. The insurance on damage to the vehicle was part of the credit transaction. The right of the seller to the returned premium would seem to be part of the "proceeds" of that transaction. If not such a part, the returned premium is property not purchased. The Senate Report, *supra* p. 864, says with reference to property not purchased, that the disclosure need not include "a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums." We are convinced that the Act does not require, and Congress did not intend it to require, an exemplification of that interest on the face of the installment contract. Because of this conclusion, we need not delve into the legal complexities of the Third Circuit decision in *Gennuso*, 566 F.2d 437; the Fifth Circuit decision in *Edmondson*, 577 F.2d 291; and the Seventh Circuit decision in *Valencia*, ____F.2d____.

The application of *Milhollin* and the 1980 actions of Congress present no retroactivity problem. We are concerned only with civil liability for nondisclosure. The buyers have shown no damage. Our decision establishes no new principle of law. Rather, it recognizes the congressional intent. Application to this case furthers the operation of TILA and produces an equitable result. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107.

Affirmed.

No. 78-1806 – *JAMES v. FORD MOTOR CREDIT COMPANY, et al.*

DOYLE, Circuit Judge, dissenting.

Because of my belief that the seller's right to unearned and returned premiums is a security interest, and thus the installment purchase contract here violates the Truth in Lending Act, I respectfully dissent.

The question is whether the provision in the contract which provides that the buyer assigns to the seller any monies payable under the insurance (on the car), including returned or unearned premiums, and which authorizes the seller on behalf of both parties to receive or collect same constitutes a violation of the Truth in Lending Act.

Regulation Z, 12 C.F.R. Section 226.2(gg), defines security interest as meaning "any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code. . . ."

This problem is not a new one. Three circuits have considered this issue and have held that the nondisclosure of the seller's right to unearned and returned premiums violates the Truth in Lending Act and subjects the seller to the remedy which is being pursued here. The cases are *Gennuso v. Commercial Bank & Trust Company*, 566 F.2d 437 (3rd Cir. 1977); *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied* 441 U.S. 951; and *Valencia v. Anderson Brothers Ford*, ____F.2d____ (7th Cir. March 20, 1980).

The earliest of these decisions is *Gennuso v. Commercial Bank & Trust Co., supra.* Here the plaintiff charged that the Commercial Bank and Trust Company failed to properly identify in the Disclosure Statement and in the Note and Security

Agreement a security interest in the proceeds and the unearned premiums in a property insurance policy covering the automobile that he had purchased. It was alleged that such failure violated the Truth in Lending Act and Regulation Z. No mention of the security interest in the insurance policy was made at the top of the note where the collateral was described. There had been some slight mention of the interest in question in the note and security agreement. It was held that the use of general language in this document was sufficient. It was said that the mention of the security interest in after-acquired property satisfied the requirements of the Act. The court held that the conduct of the bank constituted a violation of the Truth in Lending Act and Regulation Z as well.

To the same effect is *Edmondson v. Allen-Russell Ford, Inc., supra.* Here again the court held that the assignment of a returned or unearned premium of an insurance policy was a security interest for purposes of Regulation Z, in accordance with the Truth in Lending Act, and had to be disclosed. The court, through Goldberg, J., had no difficulty concluding that the unearned portion of the premium was a security interest which had to be disclosed. The court relied on *Gennuso v. Commercial Bank & Trust Co., supra.* Here again the court ruled that it was inadequate to construe the general provision that the " 'Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof. . . ' " 577 F.2d at 295. The court said that the "lender must disclose the type of security interest held, retained, or acquired and the property of the borrower which serves or will serve as the collateral." 577 F.2d at 295. A sufficient description was determined to be essential.

The third of the recent circuit cases is *Valencia v. Anderson Brothers Ford, supra,* from the Seventh Circuit. The court said:

> We therefore affirm the district court's ruling that an

> assignment of unearned or returned insurance premiums in a consumer credit installment contract is a security interest for purposes of disclosure under the TILA. This result is consistent with the liberal interpretation to be given the Act, the majority of federal court decisions addressing the issue, and a Federal Reserve Board staff interpretation of a closely analogous issue. In view of the interest in uniformity in TILA disclosures and in the absence of any persuasive argument to the contrary, we decline to break with the Third and Fifth Circuits on this issue.

Slip op. at p. 14.

The majority was influenced by the fact that on March 31, 1980, the President approved the "Truth in Lending Simplification and Reform Act," which amended 15 U.S.C. Section 1638(a), the disclosure section of the Truth in Lending Act. As amended, it was pointed out by the majority that this section permits disclosure of the principal property which provides the security for the loan. It does not require, so the Report says, a listing of related or incidental interests in the property, and it gives as an example a loan secured by an automobile which is not being purchased with the proceeds of the loan, but which would require a statement indicating that the loan is secured by an automobile. It would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums.

The majority also calls attention to the recent opinion of the Supreme Court in *Ford Motor Credit Co. v. Milhollin*, ____U.S. ____, '48 L.W. 4145, decided February 20, 1980, which adopted the approach that security documents have, in the past, carried too much excess luggage and that they should disclose with simplicity and should limit themselves to the disclosure of the matters having to do with the security itself. This may well be the present tendency, but at the time of the occurrence in

question the approach which is shown by the Third, Fifth and Seventh Circuits obtained.

In summary, the automobile insurance policy and, of course, the premium which is paid to obtain the coverage, are part and parcel of the entire automobile financing business. It makes the loan more secure.[1] Thus the unearned premium which would ordinarily go to the insured and which is being held back by the lender is information of genuine interest to the purchaser-insured, and it is not possible to cause it to be unimportant.

The new approach might render the procedure less complicated. Nevertheless, I submit that we are not justified in adopting this concept so as to apply it to the present set of facts and to do so only on the basis of legislative history which attended the enactment of the amendments. Even if the legislative history would call for a different result, it should not be applied here in a retroactive way.

For the reasons stated, I disagree with the majority opinion.

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[1] If, for example, the automobile were to be stolen or totaled out in an accident, there would be no security in the absence of insurance.

ORDER OF THE COURT OF APPEALS
DENYING PETITION FOR REHEARING
(July 21, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JODY JAMES and BARBARA JAMES,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 78-1806
FORD MOTOR CREDIT COMPANY and	)	
DEL NORTE MOTOR COMPANY,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. Civ. 78-F-647)

Before SETH, Chief Judge, BREITENSTEIN, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

ON PETITION FOR REHEARING

The petition for rehearing is denied. The petitioners-appellants object to the consideration which the court gave to the

March 31, 1980, "Trust [sic] in Lending Simplification Act" and its legislative history. The Supreme Court has said that when two acts are in *pari materia,* the later act can be "regarded as a legislative interpretation of the earlier." *United States v. Stewart,* 311 U.S. 60, 64. In *Regents of the University of California v. Bakke,* 438 U.S. 265, 349, the separate opinion of four Justices says: "We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute."

The 1968 and 1980 acts related to the same subject matter, "Truth in Lending." We are convinced that the 1980 Act reflects an interpreation [sic] by Congress of the earlier act and is entitled to great weight. The effect is that Congress in passing the 1968 act did not intend to impose a civil penalty for the type of nondisclosure claimed by the appellants.

Judge Doyle would grant the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

OPINION BELOW OF THE COURT OF APPEALS
(June 24, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LISA HERNANDEZ, Appellee,	)	
v.	)	No. 79-2322
	)	(With Nos. 79-2302,
O'NEAL MOTORS, INC., and GENERAL MOTORS ACCEPTANCE CORPORATION, Appellants.	)	79-2315, 80-1019, and 80-1020)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. C. Nos. 78-776, 78-796, 79-187, 79-226, 79-460, 79-461, 79-581, and 79-621)

Nathan H. Mann and Lawrence W. Treece (with them on the briefs were Sutin, Thayer, and Browne; Jerrald J. Roehl and Associates; Holme, Roberts and Owen; and Jeffrey A. Chase) for appellants in Nos. 79-2302, 79-2315 and 79-2322 and for appellees in Nos. 80-1019, and 80-1020.

Paula Forney of Indian Pueblo Legal Services, Inc., for appellees in Nos. 79-2302, 79-2315 and 79-2322 and appellants in Nos. 80-1019, and 80-1020.

Geraldine Azzata and Charles DuMars filed an amicus curiae brief for National Clients' Counsel, Inc.

Toby Sherwood and Mario Lewis filed an amicus curiae brief for Legal Services Corporation.

Before SETH, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

These five appeals and cross-appeals from judgments of the United States District Court for the District of New Mexico raise questions pertaining to the Truth in Lending Act, TILA, 15 U.S.C. § 1601, et seq., as implemented by the Federal Reserve Board Regulation Z, 12 C.F.R. § 226. The outcome is largely governed by our decision in No. 78-1806, *James v. Ford Motor Credit Company*, opinion filed today. Certain factual and procedural differences require separate treatment of these cases.

Buyers of motor vehicles filed ten separate actions to recover the civil liability imposed by 15 U.S.C. § 1640(a) and attorneys' fees. In each case the claim is that the seller failed to disclose in an automobile installment purchase contract its right to a returned and unearned premium on a policy covering physical damage insurance. The district court consolidated the cases for hearing and disposition. In a memorandum opinion, the court, primarily on the basis of *Edmondson v. Allen-Russell Ford, Inc.*, 5 Cir., 577 F.2d 291, *cert. denied* 441 U.S. 951, held that the sellers had violated TILA and Reg. Z by not disclosing their security interests in the returned and unearned premiums. In nine of the cases the court gave the buyers-plaintiffs judgments for the civil liability in the full statutory amount of $1,000 plus attorneys' fees in varying amounts.

The judgments in eight of the cases are before us on appeals by the sellers in our Nos. 79-2302, 79-2315 and 79-2322 which cover district court cases Nos. 78-776, 78-796, 79-187, 79-226, 79-460, 79-461, 79-581, and 79-621. In their appeals the sellers

attack the decision of the district court that they violated TILA by not disclosing their security interests in the returned and unearned insurance premiums. They also say that the court erred in awarding attorneys' fees in cases where the plaintiffs-buyers were represented by legal aid or comparable professional groups. Our Nos. 80-1019, and 80-1020 are appeals of the buyers attacking the refusal of the court to allow multiple recoveries by multiple obligors.

In seven of the appealed cases, the installment contracts were assigned by the seller to Ford Motor Credit. In one, the contract was assigned to General Motors Acceptance Corporation, GMAC. In the *James* case we set forth the pertinent provisions of TILA and Reg. Z, and also described the Ford contract. Nothing would be gained by repetition here.

Like the Ford contract, the GMAC contract details, on the signed face page, the transaction, the finance charge, and other charges including insurance. Its Par. 12 reads:

> "DESCRIPTION OF SECURITY INTEREST
> Seller retains a security interest under the Uniform Commercial Code in the property above described and any proceeds to secure payment and performance of buyer's obligation hereunder, including any additional indebtedness incurred as provided herein and under any extensions or renewals hereof."

On the reverse side, Par. 3 relates to insurance and in subparagraph (c) provides:

> "an amount equal to the unearned portion of such insurance upon seller's receipt thereof from the insurer pursuant to authorization hereby given therefor, [shall be applied] as a reduction [of the amount due under the obligation] * * *."

The district court held that the GMAC contract was not significantly different from the Ford contract. We agree. GMAC

relies on various New Mexico statutes. Under our decision in *James* these state statutes have no pertinence and merit no discussion. For the reasons stated in our *James* opinion, we hold that the sellers did not violate the disclosure requirements of 15 U.S.C. § 1638 and, hence, the buyers are not entitled to the § 1640(a) civil liability. This conclusion makes it unnecessary to consider the questions of multiple recoveries by multiple obligors and the right to attorneys' fees when the buyer is represented by a legal aid or a comparable group of lawyers.

In Nos. 79-2302, 79-2315 and 79-2322, the appeals by the sellers, the judgments in district court Nos. 78-776, 78-796, 79-187, 79-226, 79-460, 79-461, 79-581, and 79-621 are severally reversed and remanded with direction to dismiss the actions. In Nos. 80-1019, and 80-1020, the appeals by the buyers are dismissed because of our disposition of the merits of the underlying causes of action.

Nos. 79-2322, etc. – *HERNANDEZ v. O'NEAL MOTORS, INC.*

DOYLE, Circuit Judge, dissenting.

I dissent for the reasons stated in my dissent in No. 78-1806 – *JAMES v. FORD MOTOR CREDIT COMPANY.*

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

July 21, 1980

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LISA HERNANDEZ,	)	
Appellee,	)	No. 79-2322
v.	)	(With Nos.
	)	79-2302,
O'NEAL MOTORS, INC., and	)	79-2315,
GENERAL MOTORS ACCEPTACE [sic]	)	80-1019,
CORPORATION,	)	and
Appellants.	)	80-1020)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. C. Nos. 78-776, 78-796, 79-187, 79-226, 79-460, 79-461, 79-581, and 79-621)

Before SETH, Chief Judge, BREITENSTEIN, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

ON PETITION FOR REHEARING

The petition for rehearing is denied. See the Per Curiam filed today in No. 78-1806 – *James, et al. v. Ford Motor Credit Company, et al.*

Judge Doyle would grant the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

THE OPINION OF THE DISTRICT COURT
IN *JAMES*
(August 21, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78-F-647

JODY JAMES, et al.,	)	
Plaintiffs,	)	MEMORANDUM
v.	)	ORDER
	)	DISMISSING
FORD MOTOR CREDIT CO., et al.,	)	COMPLAINT
Defendants.	)	

THIS MATTER, a consumer suit arising under the Truth-in-Lending Act and associated regulations,[1] is before the court on defendants' Motion to Dismiss, filed on August 10, 1978. The complaint is in two counts. The first asserts violation of the federal laws and regulation on the basis of an alleged failure to disclose certain security interests said to be created by paragraphs 18 and 19 of the Automobile Retail Instalment [sic] Contract, dated July 27, 1977; there is also an alleged failure to disclose the Pars. 18 and 19 "security interests" on one side of a separate statement which identifies the transaction. The second count is a pendent claim sounding in conversion. A copy of the contract is appended as Exhibit A to the complaint and is incorporated by reference in the complaint.

Because it appears, as a matter of law, that there is no security interest described in either paragraph 18 or 19 of the

[1] 15 U.S.C. §§ 1601-66j (1976); 12 C.F.R. § 226 (Regulation Z).

contract, we dismiss count one of the complaint. It follows that count two, the pendent claim, should also be dismissed.

I.

Paragraph 18 of the contract is captioned "Risk of Loss-Insurance." It requires buyer to obtain insurance in an amount sufficient to protect the interests of buyer and seller and it also assigns to seller any monies payable under such insurance. This assignment is not a security interest. Colorado has adopted the Uniform Commercial Code (UCC)(cited to Colo.R.Stat. hereinafter) and the UCC definitions apply under Regulation Z (as do other definitions not applicable here). 12 C.F.R. § 226.2(gg). The UCC security interest refers to all transactions (regardless of form) intended to create such an interest and to certain sales. Colo.Rev.Stat. § 4-9-102 (1973).

The assignment of the insurance proceeds here is clearly not intended to create a security interest either in those proceeds or in the pickup truck. A reading of the entire contract makes this conclusion irresistible. The security interest is not created by Par. 18, but, rather, is described in Par. 13. Paragraph 13 is captioned "Security Interest" and sets forth the provision that the seller shall have a security interest in the property and its proceeds. There can be no doubt that the parties intended to describe their security interest in Par. 13 and not in Par. 18.

Further, the assignment of insurance proceeds under Par. 18 is obviously not a sale of accounts, chattle paper, or contract rights within the meaning of Colo.Rev.Stat. § 4-9-102(1)(b).

Plaintiff also refers to paragraph 19 of the contract. Paragraph 19 is captioned "Default" and it enumerates certain provisions having to do with default. Again, it is clear that the parties intended to describe their security interest in Par. 13 and not in Par. 19.

Since count one of the complaint depends upon their [sic]

being a security interest contained in Pars. 18 and 19 of the contract,[2] and because there is no such interest described in either paragraph, count one fails to state a claim upon which relief may be granted. Having dismissed count one, the court considers it inappropriate to retain pendent jurisdiction over count two. Count two is dismissed as well.

ORDER

For all the reasons stated above, it is ORDERED that plaintiffs' complaint and cause of action be and hereby are dismissed.

DATED at Denver, Colorado, this 21 day of August, 1978.

BY THE COURT:

/s/ Sherman G. Finesilver

SHERMAN G. FINESILVER, Judge
United States District Court

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2 Paragraph 13 of the contract, which does describe the security interest, is not before the court. The court, therefore, has no occasion to pass on defendants' contention that Par. 13 has been expressly approved by the Federal Reserve Board. The defendants cite *FRB Official Staff Interpretation*, No. FC-0023, Nov. 30, 1976, 41 F.R. 52980, CCH Consumer Credit Guide Par. 31,491 for this proposition.

THE JUDGMENT OF THE DISTRICT COURT
IN *JAMES*
(September 29, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JODY JAMES and BARBARA JAMES	)	
Plaintiffs,	)	Civil Case No.
v.	)	78-F-647
FORD MOTOR CREDIT COMPANY, and DEL NORTE MOTOR COMPANY	)	**JUDGMENT**
Defendants.	)	

Pursuant to and in accordance with the Memorandum Opinion and Order signed by the Honorable Sherman G. Finesilver, dated and filed August 21, 1978, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' complaint and cause of action are hereby DISMISSED. Defendants shall recover their costs, and said costs are to be taxed by the Clerk of the Court upon filing of the Bill of Costs. The Bill of Costs must be filed within ten (10) days after entry of this judgment.

DATED at Denver, Colorado, this 29 day of September, 1978.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK
By /s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPROVED:
/s/ Sherman G. Finesilver
JUDGE SHERMAN G. FINESILVER

OPINION OF THE DISTRICT COURT IN *HERNANDEZ*

(October 16, 1979)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LISA HERNANDEZ, * Plaintiff, v. O'NEAL MOTORS, INC., GENERAL MOTORS ACCEPTANCE CORPORATION, Defendants.	)	No. 79-226 Civil
JACKSON BROWN and DELORES BROWN, Plaintiffs, v. FRONTIER FORD, INC., a New Mexico corporation; FORD MOTOR CREDIT COMPANY, INC., a Delaware corporation, Defendants.	)	No. 78-776 Civil

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*In the interest of brevity, the caption in the *Hernandez* cases will be shortened to *Hernandez, et al. v. O'Neal Motors, et al.* throughout the remainder of this Appendix.

THERESA M. SHIELDS, Plaintiff, v. FORD MOTOR CREDIT COMPANY; CAPITOL MOTOR COMPANY, Defendants.	)	No. 78-796 Civil
NONA JACKSON, Plaintiff, v. FRONTIER FORD, INC., a New Mexico corporation doing business in the State of New Mexico; FORD MOTOR CREDIT COMPANY INC., a corporation doing business in the State of New Mexico, Defendants.	)	No. 79-187 Civil
GROVER BELLSON, Plaintiff, v. GURLEY MOTOR COMPANY; FIRST STATE BANK AT GALLUP, Defendants.	)	No. 79-362 Civil
SANDRA R. QUANDELACY, Plaintiff, v. FRONTIER FORD, INC.,; FORD MOTOR CREDIT CORP., Defendants.	)	No. 79-458 Civil

NELLIE PINO,	)	
Plaintiff,	)	
v.	)	
	)	No. 79-460 Civil
FORD MOTOR CREDIT COMPANY;	)	
MT. TAYLOR FORD, INC.,	)	
Defendants.	)	
DAVID JUANICO and LUCY JUANICO,	)	
Plaintiffs,	)	
v.	)	No. 79-461 Civil
	)	
RICHARDSON FORD SALES, INC.;	)	
FORD MOTOR CREDIT CORP.,	)	
Defendants.	)	
RITA CATA,	)	
Plaintiff,	)	
v.	)	
	)	No. 79-581 Civil
CAPITOL MOTOR COMPANY;	)	
FORD MOTOR CREDIT COMPANY,	)	
Defendants.	)	
MARIE JOHNSON,	)	
Plaintiff,	)	
v.	)	
	)	No. 79-621 Civil
FORD MOTOR CREDIT COMPANY;	)	
MT. TAYLOR FORD INC.,	)	*CONSOLIDATED*
Defendants.	)	*CASES*

MEMORANDUM OPINION

Cases 79-226, 78-776, 78-796, 79-187, 79-362, 79-458, 79-460, 79-461, 79-581 and 79-621 were consolidated because each involves whether the assignment of returned or unearned premiums of physical damage insurance must be disclosed as a security interest under the Truth-In-Lending Act (TILA), 15 U.S.C. § 1638(a) (10), and Regulation Z, 12 CFR § 226.8(b) (5). For the reasons stated below, the question must be answered in the affirmative.

In each case the facts relevant to this issue are similar in all material respects: the plaintiff entered into a motor vehicle installment contract for the purchase of a motor vehicle from the defendant seller; and on the same day, or a short time later, the contract was assigned to the defendant motor company or motor vehicle finance company.

On the face of each contract the following, or similar provision, appears:

> (13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

On the reverse side of the contract, or on a separate page, a provision requires the plaintiff, as a condition of the contract, to purchase physical damage insurance protecting the buyer's and seller's interest in the motor vehicle. The provision also contains the following or similar language:

> Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment

> thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

The TILA, Regulation Z, 12 C.F.R. §§ 226.8 and 226.6, requires a seller to disclose on the face of the sales contract, or one side of a separate statement which identifies the transaction, *inter alia,* ". . . a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . ." The TILA goes on to define a security interest subject to this disclosure requirement as:

> "any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation."

The specific question presented, therefore, is whether the assignment of returned or unearned insurance premiums of the required physical damage insurance policy creates a security interest, as defined above, which should have been disclosed on the front side of the motor vehicle sales contract.

This question was answered in *Edmondson v. Allen-Russell Ford Inc.,* 577 F.2d 291 (5th Cir. 1978), Cert. Denied ___ U.S. ___(May 15, 1979) in which, under facts similar in all material

respects to those in the cases at bar, the Court held that the assignment of returned or unearned premiums of physical damage insurance gives the creditor an interest in property which helps to secure the payment or performance of contractual obligations; and that such an interest is a security interest within the meaning of the TILA and is subject to disclosure under the provisions of §§226.8 and 226.6 of Regulation Z. *See also, Shanks v. Greenbriar Dodge Inc.*, 577 F.2d 295 (5th Cir. 1978).

Edmondson, supra, is not the only Court to have considered this question, however. In *Rounds v. Community National Bank in Monmouth,* 454 F.Supp. 883 (S.D. Ill. 1978), and again in *James v. Ford Motor Credit Co.*, 78-F647 (D. Co. 1978), appeal pending No. 78-1806 (10th Cir. 1978), the Southern District of Illinois and the District of Colorado held that the assignment of returned or unearned insurance premiums and proceeds does not create a lien or security interest as defined under state law, and that such a conclusion governs whether a security interest was created under the TILA.

Thus, *Edmondson* conflicts with *Rounds* and *James.* Nevertheless for the reasons stated below, *Edmondson* controls the question at bar.

Although none of the decisions are binding outside their respective jurisdictions, the *Rounds* and *James* decisions are less persuasive than *Edmondson* for several reasons. First, neither *Rounds* nor *James* cites a position adopted by any of the Circuit Courts, while *Edmondson,* on the other hand, was the en banc decision of the Fifth Circuit. Secondly, the *James* decision considered only the assignment of insurance proceeds, rather than the assignment of unearned or returned premiums; and thirdly, the *Rounds* decision ignores the statutory definition of a secutiry [sic] interest contained in Regulation Z, §226.6(gg) [sic] and, instead, relies upon a definition supposedly adopted

in *Mims v. Dixie Financial Corporation*, 426 F.Supp. 627 (N.D. Ga. 1976). *Mims*, however, did not define a "security interest" as restrictively as *Rounds*. *Mims* merely held that state lien law must be examined to determine the extent of a suspected "security interest," and nothing in *Mims* indicates that state law definitions of the words "lien" or "security interest" are also the definitional limits of a "security interest" under Regulation Z, §226.2(gg). Moreover *Mims*, if it ever did intend to hold that state law definitions control the TILA, was overruled *sub silentio* by the en banc decision of the Fifth Circuit in *Edmondson*.

Turning now to the merits of the matter, aside from the above precedents, the determination of whether the assignment of unearned or returned insurance premiums creates a security interest subject to disclosure under the TILA, necessarily begins with an examination of the term "security interest" as it is defined under the TILA.

Regulation Z, §226.2(gg) defines a security interest broadly as, ". . . any interest in property which secures payment or performance of an obligation." It also says that such an interest includes, but is not limited to, security interests under the Uniform Commercial Code, etc.

This definition suggests an interplay between state and federal law which can be explained as follows: State law determines the substance of the interest created, but federal law defines whether the substantive interest is a security interest. This is because the substantive rights and interests of the parties to most consumer credit transactions are governed by state law. Accordingly, whether a party has retained an interest in property which secures the payment of an obligation, must be determined by examining the law of the relevant state. But once state law determines that a party has retained an interest in another's property which secures the performance of an

obligation, then such an interest is a security interest within the meaning of the TILA because it is defined as such under the statute, and the semantics used by state law to define the interest – i.e., security interest, mortgage, lien, contract right, etc. – are irrelevant.

For example, if state law renders the assignment of unearned or returned insurance premiums unenforceable or void, or does not give the seller any rights superior to the buyer or any other creditor, then such an assignment creates no interest in property securing the payment of an obligation, and no security interest exists under the TILA. *See, Meyers v. Clearview Dodge Sales Inc.,* 539 F.2d 511, 519 (5th Cir. 1976), *cert. denied* 431 U.S. 929 (1976). If on the other hand, such an assignment does give the seller an interest in property which secures the performance of an obligation, then the interest is a security interest subject to disclosure under the TILA.

This conclusion does not conflict with FRB Letter No. 1263 (November 23, 1977). It states:

> Your first several questions relate to the treatment of insurance for disclosure purposes in various situations, which can be summarized as follows. An extension of credit is secured either by a mortgage on real property, or by a security interest in personal property. In either case, the mortgage or security agreement obligates the customer to carry either insurance for loss of or damage to the property, credit life insurance, or credit health and accident insurance (or more than one of these types of insurance). The mortgage or security agreement further provides that insurance proceeds shall be payable to the creditor, and gives the creditor an interest in all returned and unearned premiums. You ask what sort of identification of the type of security interest would comply with §226.9(b) (5) [sic] in the situations described above.

> *What constitutes adequate identification of the type of security interest acquired by the creditor depends upon how relevant State law would describe the security interest.* Note that a *more fundamental matter* in these circumstances *may be to determine whether a security interest exists at all* and, if so, to identify the property subject to such interest. Section 226.2(gg) defines 'security interest' as 'any interest in property which secures payment or performance of an obligation.' Thus, if the creditor does not acquire any interest in property (including real property and tangible or intangible personal property), or if any such interest does not secure payment of the debt, no security interest exists. *For example, the contractual right to proceed under an insurance policy may not amount to an interest in property. On the other hand, assignment of returned and unearned premiums may transfer to the creditors such an interest. However, staff believes these questions would be better addressed as a matter of State law.*
>
> . . .
>
> In summary, staff is of the opinion that an interpretation of Regulation Z will not resolve these questions but, rather, that your questions are more properly viewed as involving interpretations of State law. (emphasis added)

Thus FRB Letter 1263 says nothing more than what has already been said – state law determines whether an interest in property has been created which secures payment of the obligation. Nothing in FRB Letter 1263, however, indicates that the broad definition of a security interest contained in Regulation Z, §226.2(gg) is limited by the semantics used by state law to define interests in property.

Turning to the question at bar, the right to receive unearned or returned insurance premiums is an interest in property; and under New Mexico law, the assignment of that interest is a valid transfer of an interest in property. Furthermore, the assignment to a seller of the right to receive unearned or returned premiums

under a motor vehicle purchase contract, secures to the seller the payment of the obligation. Accordingly, the assignment creates a security interest that must be disclosed under the TILA.

Having concluded that a security interest was created, the question then becomes whether this interest is adequately disclosed by a clause in the disclosure statement saying, "seller shall have an interest under the Uniform Commerical Code in the property (described above) and in the proceeds thereof . . .." This question was disposed of in *Edmondson, supra,* at 295-296 in which the Court held that such a disclosure was not adequate for the requirements of Regulation Z.

The reasoning in *Edmondson* is equally applicable here. No layperson would understand that the word "proceeds" included anything but the item sold – a motor vehicle – or substitutes for the item upon its sale, exchange or other disposition. It would frustrate the spirit and the letter of the TILA to allow a creditor to evade its disclosure requirements by burying an interest in insurance premiums in the boilerplate of a separate document, without so much as a hint to its existence.

This conclusion is not affected by *P.P.G. Industries Inc., v. Hartford Insurance Co.,* 531 F.2d 68 (2d Cir. 1976). *See also, Paskow v. Calvert Fire Insurance Co.,* 579 F.2d 949 (5th Cir. 1978); *Aetna Insurance Co. v. Texas Thermal Industries,* 436 F.Supp., 371, 376 (E.D. Texas 1977); §§55-9-104(g) and 55-9-306 N.M.S.A. 1978. In *P.P.G., supra,* the Court held that insurance proceeds constitute "proceeds" within the meaning of the Uniform Commercial Code. But this case involves insurance premiums, not proceeds. Moreover even assuming, *arguendo,* that the term "proceeds" covers a seller's interest in returned or unearned insurance premiums, the issue here is the adequacy of the disclosure of the interest, and not the validity of the interest retained. For although using the term "proceeds" may, under the Uniform Commercial Code, grant a seller a valid

interest in the buyer's returned or unearned insurance premiums, it does not, on the other hand, adequately disclose to the consumer buyer that such an interest has been retained or the property it covers.

A further argument is made that the interest in returned or unearned premiums was properly disclosed on the back side of the disclosure statement because it was too lengthy to be included in the disclosure statement. The TILA, Regulation Z, §226.8(b) (5), however, permits separate disclosures on a separate document only, ". . . where a clear identification of the property cannot properly be made on the disclosure statement due to the length of such identification . . .," and only where the disclosure statement contains a reference to the other document containing the interest. Neither condition is met in this case. First, the disclosure statement makes no reference to the interest retained on the back side. See Regulation Z, §226.801. Secondly, the interest in insurance premiums is not lengthy. It could have easily been placed in the paragraph disclosing the security interest in the property and proceeds – seller shall have a security interest . . . in the property (described above) and in the proceeds thereof, and in the proceeds and unearned or returned premiums of the physical damage insurance.

AFFIRMATIVE DEFENSES

The defendants have individually or collectively asserted several affirmative defenses. These will be treated below.

I

15 U.S.C. §1640(c) provides a creditor with a defense where a violation is not intentional and results from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. Most recent decisions, however, have held that the unintentional violation defense of §1640(c) is only available for clerical errors which occurred

despite a system for correcting them. *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2nd Cir. 1975); *Haynes v. Logan Furniture Mart Inc.*, 503 F.2d 1161 (7th Cir. 1974); *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974). Since none of the defendants have alleged that the failure to disclose the interest retained in insurance premiums was due to a clerical error, plaintiffs are entitled to judgment as a matter of law.

Some courts have construed §1640(c) more broadly, *Thrift Funds of Baton Rouge Inc. v. Jones*, 472 So. 2d 150 (La.); *Welmaker v. W.T. Grant Co.*, 365 F.Supp. 531 (N.D. Ga.), and the Tenth Circuit has yet to adopt either interpretation. *Hinkle v. Rock Springs National Bank*, 538 F.2d 295 (10th Cir. 1976). Nevertheless, the limitation of §1640(c) to clerical or mathematical errors is the better rule. Without such a limitation the TILA would be totally frustrated because any creditor with enough sense to read the Act could avoid its sanctions by merely applying his own good faith interpretations to it. Such was neither the spirit nor the intent of the provision in question.

II

15 U.S.C. § 1640(f) provides that a creditor is not liable under the TILA where the disclosures are made in good faith and in conformity with the rules, regulations and interpretations of the TILA as promulgated by the Federal Reserve Board. Specifically, it extends the good faith reliance defense to include reliance on "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe." *See*, 12 Ga.L. Rev. 814, 880 (1978).

Here, none of the defendants have pointed to any interpretation or approval of the Federal Reserve Board upon which they could have, in good faith, relied in failing to disclose the unearned premiums as a security interest. Argument has been

made that FRB Letter No. 1263 (November 23, 1977) would support such a defense. However, as has already been indicated, FRB Letter No. 1263 did not state that the assignment of unearned premiums would, or would not, create a security interest under the TILA; rather, it merely advised that state law had to be consulted to see if an interest in property had been created which secured the payment of an obligation. Since this Court has already held that, under State law, such an interest was created, plaintiffs are entitled to judgment as a matter of law on this issue.

III

Several of the defendants argue that they are mere assignees and are not liable as creditors under the TILA. 15 USC § 1614, however, provides that an action may be brought against any subsequent assignee where the violation from which the liability arose is apparent on the face of the instrument assigned.

Here, the violation is apparent on the face of the assigned documents, and the liability therefor can be determined as a matter of law. Accordingly, the assignees of the documents are liable as creditors under the TILA.

IV

The final defense raised by several defendants is that the transactions were not bona fide consumer credit transactions subject to the requirements of the TILA.

Under certain circumstances, this has been held to be a valid defense. *See, Kenney v. Landis Financial Group, Inc.*, 376 F. Supp. 852 (D.C. Ia. 1974). Here, the facts and circumstances of each case are unclear, and the Court will have to hear the matter, along with the issue of damages, at trial.

/s/ H. Vearle Payne

UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW
BY THE DISTRICT COURT IN *HERNANDEZ*
(November 20, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERNANDEZ, et al.,	)	
Plaintiffs,	)	
-vs-	)	No. CV-79-226
	)	Consolidated
O'NEAL MOTORS, INC., et al.,	)	
Defendants.	)	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

From the evidence heard in open Court and from stipulations made by counsel, the Court makes the following supplemental findings of fact and conclusions of law, in addition to the findings and conclusions implicit in this Court's previously filed Memorandum Opinions dated October 16, 1979, and November 8, 1979, regarding all cases consolidated in *Hernandez v. O'Neal*, No. 79-226-P, except *Quandelacy v. Frontier Ford, Inc.*, No. 79-458.

FINDINGS OF FACT

1. That in 79-226-P plaintiff Lisa Hernandez entered into a credit transaction on or about October 20, 1978, with the defendant O'Neal Motors Inc., for the purchase of a 1979 Chevrolet which was used for personal, family and household purposes.

2. That in 79-226-P the said credit transaction was subsequently assigned to General Motors Acceptance Corporation for valuable consideration.

3. That in 79-226-P plaintiffs' Exhibit A to the first amended complaint is a true and accurate copy of the disclosure statement evidencing said transaction which specifies that the amount of the financial charge was $1,412.63.

4. That in 79-226-P the parties agree that a reasonable attorney's fee for prosecuting the cause is $500.00.

5. That in 78-776 plaintiffs Jackson Brown and Delores Brown entered into a credit transaction on or about February 8, 1978, with the defendant Frontier Ford, Inc., for the purchase of a 1978 Ford truck which was used for personal, family and household purposes. The contract, of which plaintiffs' exhibit A to their complaint is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

6. That in 78-776 the amount of the finance charge was $1,830.71.

7. That in 78-776 a reasonable attorney's fee for prosecuting the cause is $1,950.00, or 37 attorney hours at $50.00 per hour plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

8. That in 78-796 plaintiff Theresa Shields entered into a credit transaction on or about July 7, 1978, with the defendant Capitol Motor Company, for the purchase of a 1978 Ford Granada which was used for personal, family and household purposes. The contract, of which plaintiff's exhibit 1, is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

9. That in 78-796 the amount of the finance charge was $1,774.82.

10. That in 78-796 a reasonable attorney's fee for prosecuting the cause is $1,347.50, or 24.95 attorney hours at $50.00 per hour plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

11. That in 79-187 plaintiff Nona Jackson entered into a credit transaction on or about February 27, 1978, with the defendant Frontier Ford, Inc., for the purchase of a 1977 used Ford pickup truck which was used for personal, family and household purposes. The contract, defendant's exhibit 1, was assigned to the defendant Ford Motor Credit Company.

12. That in 79-187 the amount of the finance charge was $905.24.

13. That in 79-187 a reasonable attorney's fee for prosecuting the cause is $1,175.00, or 15 attorney hours at $50.00 per hour for work done by Helen Lopez plus $325.00 for work done by attorney Howard Graham, plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

14. That in 79-362 plaintiff Grover Bellson entered into a credit transaction on or about May 17, 1978, with the defendant Gurley Motor Company for the purchase of a 1978 Ford pickup which was used for personal, family and household purposes. The contract, of which plaintiff's exhibit A to his complaint is a true and accurate copy, was assigned to the defendant State Bank of Gallup.

15. That in 79-362 the amount of the finance charge was greater than $500.00.

16. That in 79-362 the parties have stipulated that a reasonable attorney's fee for prosecuting the cause is $500.00.

17. That in 79-460 plaintiff Nellie Pino entered into a credit transaction on or about June 23, 1978, with the defendant Mt. Taylor Ford, Inc. for the purchase of a 1978 Ford pickup truck which was used for personal, family and household purposes. The contract, of which plaintiff's exhibit B is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

18. That in 79-460 the amount of the finance charge was $1,117.52.

19. That in 79-460 a reasonable attorney's fee for prosecuting the cause is $870.80, or 15.416 attorney hours at $50.00 per hour plus $100.00 for the attorney's appearance at the hearing November 16, 1979.

20. That in 79-461 the plaintiffs David Juanico and Lucy Juanico entered into a credit transaction on or about March 31, 1979, with the defendant Richardson Ford Sales, Inc., for the purchase of a 1979 Ford which was used for personal, family and household purposes. The contract, of which plaintiffs' exhibit F is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

21. That in 79-461 the amount of the finance charge was $2,239.96.

22. That in 79-461 a reasonable attorney's fee for prosecuting the cause is $858.30, or 15.166 attorney hours at $50.00 per hour plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

23. That in 79-581 the plaintiff Rita Cata entered into a credit transaction on or about August 17, 1978, with the defendant Capitol Motor Company for the purchase of a 1978 Ford Pinto which was used for personal, family and household purposes. The contract, of which plaintiff's exhibit E is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

24. That in 79-581 the amount of the finance charge was $1,090.91.

25. That in 79-581 a reasonable attorney's fee for prosecuting the cause is $375.00, or 5.5 attorney hours at $50.00 per hours plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

26. That in 79-621 the plaintiff Marie Johnson entered into a credit transaction on or about August 4, 1978, with the defend-

ant Mt. Taylor Ford, Inc., for the purchase of a 1978 Ford truck which was used for personal, family and household purposes. The contract, of which plaintiff's exhibit C is a true and accurate copy, was assigned to the defendant Ford Motor Credit Company.

27. That in 79-621 the amount of the finance charge was $2,418.08.

28. That in 79-621 a reasonable attorney's fee for prosecuting the cause is $387.50, for 5.75 attorney hours at $50.00 per hour plus $100.00 for the attorney's appearance at the hearing on November 16, 1979.

29. That in each case the issues were neither novel nor difficult since case law closely on point existed at the time of the litigation.

30. That in each case the skill required to perform the legal services rendered was neither above nor below that required in other Federal litigation.

31. That in each case the attorney had little opportunity cost in pressing the litigation since he or she worked for a Legal Aid Society.

32. That the customary fee for like work is $50.00 per hour.

33. That in each case the attorney expected to receive the statutory award of a reasonable attorney's fee.

34. That in each case the time requirements of the circumstances were minimal since each case involved only issues of law and few evidentiary matters.

35. That in each case the amount in controversy is statutory and irrelevant for determining the attorney's fees.

36. That in each case the attorney had been in practice for only a few years, and although experienced in consumer affairs,

he or she cannot be classified as a specialist deserving greater fees than other attorneys.

37. That in each case the plaintiffs had an ad hoc relationship with their attorney.

38. That in each case attorney's fees awarded in other Truth-in-Lending cases cannot guide this Court because other cases are not sufficiently similar to guide this Court in its award of fees.

39. That the factors listed above have guided this Court in awarding attorneys fees, according to the hours and rates listed above.

40. The Court makes no supplemental findings regarding *Quandelacy v. Frontier Ford, Inc.*, No. 79-458, at this time.

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of these causes pursuant to §130(e) of the Truth-In-Lending Act, 15 U.S.C. §1640(e), and 28 U.S.C. §1337.

2. That in each case the plaintiff or plaintiffs were involved in a consumer credit transaction. *See, Kenney v. Landis Financial Group*, 376 F.Supp. 852 (D.C. Ind. [sic] 1974).

3. That in each case the defendants are liable for violating the Truth-In-Lending Act as explained in the Court's previously filed Memorandum Opinions dated October 16, 1979, and November 8, 1979.

4. That in each case the plaintiff or plaintiffs are entitled to recover attorney's fees, notwithstanding their respective attorney was employed by a Legal Aid Society. *Alyeska Pipeline Services Co. v. The Wilderness Society*, 421 U.S. 240, 261, n.34 (1974).

5. That in 79-226-P the plaintiff Lisa Hernandez is entitled to judgment in the amount of $1,000.00 plus $500.00 for attorney's fees. 15 U.S.C. §1640.

6. That in 78-776 the plaintiffs Jackson Brown and Delores Brown are entitled to judgment in the amount of $1,000.00 plus $1,950.00 for attorney's fees. 15 U.S.C. §1640.

7. That in 78-796 the plaintiff Theresa M. Shields is entitled to judgment in the amount of $1,000.00 plus $1,347.50 for attorney's fees. 15 U.S.C. §1640.

8. That in 79-187 the plaintiff Nona Jackson is entitled to judgment in the amount of $1,000.00 plus $1,175.00 for attorney's fees. 15 U.S.C. §1640.

9. That in 79-362 the plaintiff Grover Bellson is entitled to judgment in the amount of $1,000.00 plus $500.00 for attorney's fees. 15 U.S.C. §1640.

10. That in 79-460 the plaintiff Nellie Pino is entitled to judgment in the amount of $1,000.00 plus $870.80 for attorney's fees. 15 U.S.C. §1640.

11. That in 79-461 the plaintiffs David Juanico and Lucy Juanico are entitled to judgment in the amount of $1,000.00 plus $858.30 for attorney's fees. 15 U.S.C. §1640.

12. That in 79-581 the plaintiff Rita Cata is entitled to judgment in the amount of $1,000.00 plus $375.00 for attorney's fees. 15 U.S.C. §1640.

13. That in 79-621 the plaintiff Marie Johnson is entitled to judgment in the amount of $1,000.00 plus $387.50 for attorney's fees. 15 U.S.C. 1640.

14. That in each case the plaintiff or plaintiffs shall recover their respective costs.

15. The Court makes no supplemental conclusions regarding *Quandelacy v. Frontier Ford, Inc.*, No. 79-458 at this time.

/s/ H. Vearle Payne

UNITED STATES DISTRICT JUDGE

JUDGMENT OF THE DISTRICT COURT
IN *HERNANDEZ*
(November 20, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERNANDEZ, et. al.,	)	
Plaintiffs,	)	
–vs–	)	No. CV-79-226
O'NEAL MOTORS, et al.,	)	Consolidated
Defendants.	)	

JUDGMENT

The above entitled causes consolidated in *Hernandez v. O'Neal,* No. 79-226-P, except *Quandelacy v. Ford,* No. 79-458, having come on for hearing and the Court having filed its Memorandum Opinions dated October 16, 1979, and November 8, 1979, along with its Supplemental Findings of Fact and Conclusions of Law,

NOW, THEREFORE

IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED:

1. That in cause 79-226-P final judgment in favor of the plaintiff Lisa Hernandez and against the defendants O'Neal Motors, Inc., and General Motors Acceptance Corporation shall be, and it is hereby, granted in the amount of $1,000.00 plus $500.00 for attorney's fees.

2. That in cause No. 78-776 final judgment in favor of the plaintiffs Jackson Brown and Delores Brown and against the defendant Frontier Ford, Inc., and Ford Motor Credit Company shall be, and it is hereby, granted in the amount of $1,000.00 plus $1,950.00 for attorney's fees.

3. That in 78-796 final judgment in favor of the plaintiff

Theresa M. Shields and against the defendants Ford Motor Credit Company and Capitol Motor Company shall be, and it is hereby, granted in the amount of $1,000.00 plus $1,347.50 for attorney's fees.

4. That in 79-187 final judgment in favor of the plaintiff Nona Jackson and against the defendants Frontier Ford Inc., and Ford Motor Credit Company, shall be, and it is hereby, granted in the amount of $1,000.00 plus $1,175.00 for attorney's fees.

5. That in 79-362 final judgment in favor of the plaintiff Grover Bellson and against the defendants Gurley Motor Company and First State Bank at Gallup, shall be, and it is hereby, granted in the amount of $1,000.00 plus $500.00 for attorney's fees.

6. That in 79-460 final judgment in favor of plaintiff Nellie Pino and against the defendants Ford Motor Credit Company and Mt. Taylor Ford, Inc., shall be, and it is hereby, granted in the amount of $1,000.00 plus $870.80 for attorney's fees.

7. That in 79-461 final judgment in favor of the plaintiffs David Juanico and Lucy Juanico and against the defendants Richardson Ford Sales, Inc., and Ford Motor Credit Company, shall be, and it is hereby granted in the amount of $1,000.00 plus $858.30 for attorney's fees.

8. That in 79-581 final judgment in favor of the plaintiff Rita Cata and against the defendants Capitol Motor Credit Company [sic] and Ford Motor Credit Company shall be, and it is hereby, granted in the amount of $1,000.00 plus $375.00 for attorney's fees.

9. That in cause no. 79-621 final judgment in favor of the plaintiff Marie Johnson and against the defendants Ford Motor Credit Company and Mt. Taylor Ford, Inc., shall be, and it is hereby, granted in the amount of $1,000.00 plus $387.50 for attorney's fees.

10. That in each case listed above the plaintiff or plaintiffs shall recover their respective costs.

/s/ H. Vearle Payne
UNITED STATES DISTRICT JUDGE

FEDERAL RESERVE BOARD
PUBLIC POSITION LETTER NO. 377

Sec. 226.4(a) Proceeds of loan used to
226.8(b) purchase insurance.
226.8(c)

July 22, 1970

As we understand the proposed plan, your client proposes to place literature in its loan offices concerning insurance to be sold by a company unrelated to your client. Applications for a single premium lifetime accidental death and dismemberment policy are available in each office and if a customer desires to purchase such a policy with the proceeds of his loan, a check will be sent directly to the company from your client in payment of the premium. While your client will not require the purchase of this insurance and the proceeds of the policy would in no circumstances be used to pay any portion of an unpaid balance of the loan, your client would be designated as owner of the policy during the term of the loan. In the event of the customer's default, your client would have the right to cancel the policy and apply any premium refund to the unpaid balance of the loan.

Under the circumstances, we think it would be appropriate to disclose the loan company's ownership of the policy as a type of "security interest" under Section 226.8(b)(5) and disclosures need not be made under Section 226.4(a)(5). The amount of the premium would not be included in the "finance charge" nor would it be disclosed as an "other charge."

Tynan Smith
Assistant Director

PARAGRAPH NUMBER 10 FROM
SHIELDS V. FORD MOTOR CREDIT COMPANY
CV-78-796, Consolidated with CV-79-226
(October 20, 1978)

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10. In the course of the consumer credit transaction Defendants violated the Truth-in-Lending act and Regulation Z, including but not limited to the following violations:

a) Defendants violated Regulation Z 226.8 (b) (5) by failing to disclose a description or identification of the type of security interest held or to be retained or acquired by the creditor in connection with the extension of credit.

b) Defendants violated Regulation Z 226.8 (b) (5) by failing to give a clear identification of the property to which the security interest relates.

c) Defendants violated Regulation Z 226.8 (a) by failing to fully identify on the disclosure statement all creditors.

d) Defendants violated Section 15 U.S.C. 1639 (a) (2) of the Act by failing to individually itemize all charges which are included in the amount of credit extended but which are not part of the finance charge.

e) Defendants violated Regulation Z 226.6 (a) by failing to print the terms "finance charge" and "annual percentage rate" more conspicously than other terminology required to be disclosed.

f) Defendants violated Regulation Z 226.8 (b) (3) by failing to disclose the number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

g) Defendants violated Regulation Z 226.6 (a) by failing to clearly, conspicuously, and in a meaningful sequence make all disclosures in accordance with the Act and Regulation Z.

h) Defendants violated Regulation Z 226.6 (c) by the disclosure of additional information which was so utilized and

placed as to mislead and confuse the plaintiff and contradict, obscure and detract from the information required to be disclosed by the Act and Regulation Z.

i) Alternatively, Defendants violated Regulation Z 226.8 (a) (1) (2) by failing to make all disclosures required by the Act and Regulation Z on the instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the plaintiff's signature and/or by failing to make all disclosures, required by the Act and Regulation Z, on one side of a separate statement which identifies the transaction.

NEW MEXICO AUTOMOBILE RETAIL INSTALMENT CONTRACT

DATE 07/07/78

Buyer (and Co-Buyer) - Name and Address (Include - County and Zip Code)

Theresa M. Shields
P.O.Box 264,
Penasco, NM 87553

Account Number

Seller - Name and Address

Capitol Motor Co
301 North Guadalupe
Santa Fe, NM 87501

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) having been quoted both a deferred payment price and a lesser cash price hereby purchases from Seller on a deferred payment price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

New or Used	Year and Make	Model, Series	Body Style	No. Cyl.	If Truck Ton Capacity	Manufacturer's Serial Number	Use For Which Purchased
NEW	78 Ford	Granada	2 Dr	8		8E81L208328	[X] Personal [ ] Business [ ] Agriculture

INCLUDING:
[X] Radio [X] Air Conditioner [X] Automatic Transmission [X] Power Steering [ ] Power Brakes [ ] Power Seats [ ] Power Windows [ ]

DESCRIPTION OF TRADE IN

(Year and Make)	(Gross Allowance)	(Amount Owing)
76 Chev	2750.00	1705.32

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) Physical Damage Insurance: Coverages checked below for a term of ____ months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof, covering accidental physical damage to the Property based on actual cash value at the time of loss not to exceed policy limits payable to Buyer or Seller as interests may appear:

[ ] Comprehensive [ ] Fire-Theft & Combined Additional Coverage $ n/a (a)

[ ] $ ____ Deductible Collision [ ] Towing & Labor Costs ($25.00 Limit)

(b) Credit Life Insurance on the life of Theresa M. Shields (Insured Person) for the term of this Contract.

[ ] Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below

[X] Provided by Western National Life in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date. $ 199.98 (b)

(c) Credit Accident and Health or Disability Insurance on (Insured Person) ____

Provided By ____
for the term of this Contract in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date ..... $ n/a (c)

(d) Other Optional Insurance ____ $ n/a (d)
(describe)

Provided By ____
for a term of ____ months.

Total Cost of Optional Insurance ..... $ 199.98

NOTICE TO BUYER: (1) You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

Buyer(s) Theresa M. Shields Date 07/07/78

Cost of insurance to be excluded only if signed by each insured Buyer and dated)

DETAILS OF TRANSACTION
(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

(1) Cash Price		$ 6670.00 (1)
Cash Down Payment	$ 20.00	
Trade In (See Opposite)	$ 1044.68	
(2) Total Down Payment		$ 1064.68 (2)
(3) Unpaid Balance of Cash Price (Difference between Items 1 & 2)		$ 5605.32 (3)
(4) Other Charges *	15.00	
Optional Insurance (See Opposite)	$ 199.98	
Official Fees	$ n/a	
Taxes (Not included in Cash Price)	$ 78.40	
License, Title & Registration Fee	$ 18.00	
Service Policy	$ n/a	
Total Other Charges		$ 311.38 (4)
(5) Unpaid Balance - Amount Financed		$ 5916.70 (5)
(6) FINANCE CHARGE		$ 1774.82 (6)
(7) ANNUAL PERCENTAGE RATE	13.51 %	(7)
(8) Total of Payments (Sum of Items 5 & 6)		$ 7691.52 (8)

(9) Payment Schedule: Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in 48 monthly instalments of $ 160.24 each and one final instalment of $ n/a on the like day of each month commencing 08/06 19 78, or, if no date is specified, one month after the date of this contract.

* Licensing Services Performed by Seller

(10) Balloon Payment(s) $ n/a on $ n/a
(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment)
A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(11) Deferred Payment Price (Sum of Items 1, 4 & 6) $ 8756.20 (11)

(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $15.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.

(13) Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method subject to retention by Seller of a minimum Finance Charge of $25.00. No rebate will be made if the amount thereof

Buyer(s) Theresa M. Shields Date 07/07/78

Cost of insurance to be excluded only if signed by each insured Buyer and dated.

CREDIT LIFE INSURANCE ELIGIBILITY

Credit life insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 66 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within one year from the date hereof or from certain pre-existing diseases or conditions within ninety days from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller Capitol Motor Co

By_____ Title_____

(14) Prepayment Rebate. Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method subject to retention by Seller of a minimum Finance Charge of $25.00. No rebate will be made if the amount thereof is less than $1.00.

(15) Additional Terms and Conditions. The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

NOTICE TO THE BUYER

1. Do not sign this contract before you read it or if it contains any blank spaces.
2. You are entitled to an exact copy of the contract you sign. Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

NOTICE TO BUYER

LIABILITY INSURANCE FOR BODILY INJURY CAUSED TO YOURSELF OR TO OTHERS OR PROPERTY DAMAGE CAUSED TO OTHERS IS NOT PROVIDED WITH THIS AGREEMENT. IF YOU DESIRE LIABILITY INSURANCE COVERAGE, YOU SHOULD OBTAIN SUCH COVERAGE FROM AN AGENT OF YOUR CHOICE.

Buyer Theresa M. Shields

Co-Buyer

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

ADDITIONAL TERMS AND CONDITIONS

16. ASSIGNMENT
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

17. USE OF PROPERTY - WARRANTIES
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. **No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.**

18. RISK OF LOSS - INSURANCE
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insu once, by whomever obtained, including returned or uncarned premiu and Seller hereby is authorized on behalf of both Buyer and Seller receive or collect same, to endorse checks or drafts in payment ther of, to cancel such insurance or to release or settle any claim w respect thereto. The proceeds from such insurance, by whomever o tained, shall be applied toward replacement of the Property or payme of the indebtedness hereunder in the sole discretion of Seller.

19. DEFAULT
Time is of the essence of this contract. In the event Buyer defaults in a payment, or fails to obtain or maintain the insurance required hereund or fails to comply with any other provision hereof, or a proceeding bankruptcy, receivership or insolvency shall be instituted by or agai Buyer or his property, or Seller deems the Property in danger of misu or confiscation, or Seller otherwise reasonably deems the indebtedne or the Property insecure, Seller shall have the right to declare all amou due or to become due hereunder to be immediately due and payable a Seller shall have all the rights and remedies of a Secured Party und the Uniform Commercial Code, including the right to repossess t Property wherever the same may be found with free right of entry, a to recondition and sell the same at public or private sale. Upon reque Buyer shall deliver the Property to Seller at a place designated Seller. Seller shall have the right to retain all payments made prior repossession and Buyer shall remain liable for any deficiency to the exte permitted by law. Any personalty in or attached to the Property wh repossessed may be held by Seller without liability and Buyer shall deemed to have waived any claim thereto unless written demand certified mail is made upon Seller within 24 hours after repossessio Buyer agrees to pay reasonable attorneys' fees (15% if permitted by la and court costs and other reasonable expenses incurred by Seller effecting collection, repossession or resale hereunder as permitted by la Seller's remedies hereunder are in addition to any given by law and m be enforced successively or concurrently. Waiver by Seller at any defau shall not be deemed a waiver of any other default.

20. GENERAL
No transfer, renewal, extension or assignment of this contract or an interest hereunder, and no loss, damage or destruction of or to th Property, shall release Buyer from his obligations hereunder. Th contract constitutes the entire agreement between the parties and n modification hereof shall be valid in any event, and Buyer expressl waives the right to rely thereon, unless made in writing signed b Seller. Any provision of this contract prohibited by applicable la shall be ineffective to the extent of such prohibition without invalida ting any other provision of this contract. This contract shall b governed by the laws of the state in which the original Seller located as shown on the face of this contract.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and dis charge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upo demand the full amount remaining unpaid thereunder together with a reasonable attorney's fee (15% of the amount then due, or if prohibited, the amoun permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change i the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of a with any party liable for the payment thereof, or the release or non perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notice of non payment and dishonor, and any other demands and notices required by law.

Guarantor _____ Address _____

Guarantor _____ Address _____

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with a reasonable attorney' fee (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law.

Guarantor_____ Address _____

Guarantor_____ Address _____

FORD LIFE INSURANCE COMPANY
NOTICE OF PROPOSED GROUP CREDIT LIFE INSURANCE

Notice hereby is given that if a charge for group credit life insurance to be provided by Ford Life Insurance Company, Dearborn, Michigan, under its Group Policy No. 2200 is separately stated as a part of the balance payable under the annexed retail instalment instrument, and if such instrument is assigned or otherwise transferred to Ford Motor Credit Company, the group policyholder, and if the person to be insured is eligible for such insurance as hereinafter provided, life insurance protection under the said Group Policy will be provided upon the life of such person with respect to such instrument. Any natural person is eligible for such insurance if he is primarily or secondarily obligated to make the payments provided in such instrument and has not attained his 65th birthday on or before the effective date of such instrument. The Insured Person will be the person named as such in such instrument if such person is eligible for insurance hereunder. In the event no person is named as the Insured Person, or if the person so named is not eligible for such insurance, then the Insured Person will be: (a) If the Buyer named in such instrument is one or more natural persons, that natural person whose signature as "Buyer" appears first, (b) If the Buyer named therein is a partnership, that natural person, being a partner, whose signature on behalf of the partnership appears first, or (c) If any Buyer named therein is a corporation, that natural person who is personally obligated on the instrument and whose signature as "Buyer" or "Co-Buyer" appears first, provided that in the event there is no natural person obligated under such instrument under the age of 66 as of the effective date thereof, all provisions with respect to such credit life insurance will be void and of no effect. Such insurance will become effective from the date the obligation of the Buyer named in such instrument is incurred and will, in the absence of default in any payment coming due thereunder, remain in force, subject to the terms of the Group Policy, until discharge of all obligations thereunder. Any amount becoming payable at the death of the Insured Person will be applied to reduce or extinguish Buyer's obligation thereunder. The amount of insurance will be the amount owing from time to time under such instrument but not to exceed $10,000 less the amount of existing insurance on the date of such instrument with respect to any other obligation for which the Buyer is insured under the said Group Policy; provided that the amount payable under the said Group Policy will be limited to a credit or refund of the amount included as the premium or cost of such insurance in such instrument in the event that death of the Insured Person results from (a) suicide, while sane or insane, within one year from the effective date of the insurance, or (b) a disease, injury or health condition for which the Insured Person was hospitalized or received medical treatment within the thirty days immediately preceding the effective date of the insurance, if death occurs within the ninety days immediately following such date. If the insurance becomes effective, a certificate of insurance describing the coverage afforded in greater detail will be furnished to the Buyer within thirty days. If the insurance is declined by the insurer or otherwise does not become effective or if a charge for an amount of insurance in excess of the foregoing limits is made, notice thereof will be sent to the Buyer and the appropriate portion of the charge for such insurance together with the finance charge applicable thereto promptly will be credited or refunded to the Buyer. In the event such insurance terminates during the lifetime of the Insured Person, the portion of the insurance charge applicable to the period subsequent to the date of termination will be refunded or credited to the Buyer. No refund or credit of insurance charge will be made if the amount thereof is less than $1.00. The insurance charge refund formula is on file with the state official having supervision of the proposed insurance and a copy thereof is on file with the group policyholder.
FLI3025

THE ABOVE NOTICE APPLIES ONLY IF A CHARGE FOR CREDIT LIFE INSURANCE UNDER FORD LIFE INSURANCE COMPANY'S GROUP POLICY NO. 2200 HAS BEEN STATED IN THE ANNEXED INSTRUMENT. IF A CHARGE FOR OTHER CREDIT LIFE INSURANCE OR OTHER INSURANCE HAS BEEN INCLUDED THEREIN, BUYER WILL BE FURNISHED WITH SUCH APPLICATION, NOTICE, CERTIFICATE OR POLICY WITH RESPECT THERETO AS IS REQUIRED BY LAW.